No. 85-21 (18)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY AND BIG D BUILDING SUPPLY CORP.,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONERS' OPPOSITION TO THE MOTION OF NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC. AND THE REGULAR COMMON CARRIER CONFERENCE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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Pursuant to Rule 36.3 of the Rules of the Supreme Court, petitioners oppose the Motion of National Motor Freight Traffic Association, Inc. and the Regular Common Carrier Conference for Leave to File Brief

as *Amicus Curiae* in Support of Respondents and request that the motion be denied. The grounds for this opposition are two-fold:

1. The entities proffering the *amicus* brief are essentially the alter ego of respondents and the proffered brief represents a transparent attempt to reinforce respondents' brief on the merits by adding redundant material which exceeds the Court's page limitations.

2. With reference to Rule 36.3, the proffered *amicus* brief would not set forth facts or questions of law that have not been or will not be adequately presented by the parties, especially in light of the alter ego relationship between respondents and *amici*.

I. The Proffered Amicus Brief Represents An Attempt To Exceed Page Limitations By Adding A Redundant Brief To The Record

Supreme Court Rule 34 imposes a 50-page limit on a brief on the merits. The brief of respondents is 48 pages long. The challenged *amicus* brief is 22 pages long. The *amicus* brief nominally propounds the views of the National Motor Freight Traffic Association, Inc. (NMFTA) and the Regular Common Carrier Conference (RCCC). *Each* of the motor carrier respondents in this matter is a member of the National Motor Freight Traffic Association.[1] *Moreover, each of the respondent motor carriers has appointed the NMFTA as its agent for the very tariff filings which are said by the NMFTA to justify its filing.*

[1]In preliminary discovery proceedings in this action, a representative of each defendant carrier confirmed this affiliation at his deposition.

Counsel for the NMFTA is the firm of Rea, Cross & Auchincloss at One Thomas Circle, N.W., Washington, D.C. Counsel for the respondent Niagara Frontier Tariff Bureau is the firm of Rea, Cross & Auchincloss at One Thomas Circle, N.W., Washington, D.C.

Amicus RCCC is an affiliated conference of the American Trucking Associations, Inc., an organization to which defendants belong and to whose tariffs the respondents are subscribing members. Once again, an agency relationship exists, this time between the respondents and the American Trucking Associations, Inc. As noted in the *amici*'s moving papers, RCCC members participate in collectively established classifications in the National Motor Freight Classification and in the collectively established rates in the tariffs of one or more of the ten major rate bureaus including respondent Niagara Frontier Tariff Bureau.

The Court also may wish to note that in *Interstate Commerce Commission, et al. v. American Trucking Associations, Inc., et al.*, 104 S.Ct. 2458 (1984) decided June 5, 1984, the parties to the proceeding included respondent Niagara Frontier Tariff Bureau, Inc. and American Trucking Associations, Inc., RCCC's parent affiliate. Counsel in the *ICC* case for both the ATA and the Niagara Frontier Tariff Bureau, Inc. once again was the firm Rea, Cross & Auchincloss.

In short, there appears to be a near complete identity of interest between respondents and *amici* as well as a direct agency relationship. The same parties, in effect, are attempting to file two briefs.

II. The Proffered Amicus Brief Does Not Represent The View Of An Entity Whose Views Have Not Been Adequately Represented Or Previously Presented By The Parties

Amici cannot meet the test of Rule 36 that the Motion for Leave to File a Brief set forth facts or questions of law that have not been or will not be adequately presented. Indeed, the headnotes in the table of contents and the authorities cited by NMFTA and by respondents in their brief display substantial overlap. Both arguments which NMFTA wishes to assert, 1) that the filed rate doctrine bars recovery of antitrust damages and 2) that shippers have adequate remedies under the Interstate Commerce Act, are fully encompassed within the arguments already presented by the respondents. Thus, the proffered *amicus* brief plays no legitimate role in presenting pertinent arguments which other parties have failed to address. Rather, the proffered brief seeks to add additional weight to previously presented arguments by presenting these arguments in cumulative fashion.

For the above reasons, the Motion for Leave to File should be denied.

Respectfully submitted,

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